



City of Philadelphia

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MEMORANDUM

TO: Bernie Brunwasser, Chairman, Water, Sewer and Storm Water Rate Board
FROM: Sozi Pedro Tulante, City Solicitor *Sozi Pedro Tulante*
DATE: June 6, 2016
SUBJECT: Rate Board's Authority over IWRAP Design and Delinquency Collection

Introduction

You have asked for advice on several issues concerning the authority of the Water, Sewer and Storm Water Rate Board, established pursuant to Philadelphia Home Rule Charter § 5-801 and Philadelphia Code § 13-101(3) (the "Rate Board"). The current Rate Proceeding is the first to be conducted since the ordinance establishing the Rate Board was enacted. This will confirm and elaborate on informal advice conveyed to you on May 26, 2016.

The Philadelphia Home Rule Charter ("Charter") provides in relevant part:

In accordance with such standards as the Council may from time to time ordain, the Water Department shall fix and regulate rates and charges for supplying water, including charges to be made in connection with water meters, and for supplying sewage disposal services; provided however, that City Council may by ordinance, establish an independent rate-making body to be responsible for fixing and regulating rates and charges for water and sewer services[.]

Charter § 5-801. Consistent with that, The Philadelphia Code ("Code") states:

[the Board] shall fix and regulate rates and charges for supplying water, sewer and storm water service for accounts and properties located in the City of Philadelphia, in accordance with the standards established in this Section 13-101 without further authorization of Council.

Code § 13-101(3).

1. Should the Rate Board make a determination as to whether the Department has fulfilled its obligation under the prior rate case and, if so, would the Water Department's failure prevent the Rate Board from considering the current Rate Proceeding?

"It is axiomatic that [an administrative agency's] power is statutory; and the legislative grant of power to act in any particular case must be clear." *City of Philadelphia v. Philadelphia Elec. Co.*, 473 A.2d 997, 1000 (Pa. 1984). Both the Charter and the Code state that the Board shall "fix and regulate rates and charges" and the Code directs further:

Whenever the Water Department has proposed changes to the rates and charges, the Board, having acted in accordance with this Section 13-101, shall issue a written report incorporating the information used by the Board in reaching a decision to approve, modify or reject the proposed rates and charges.

Code § 13-101(4)(b)(iii). Nothing suggests that the Rate Board has the power to determine whether the Department has fulfilled its obligations under a previous Rate Proceeding or that the Rate Board could or should refuse to consider a new rate proposal on that basis. The plain language of the ordinance requires just the opposite, that the Rate Board hold hearings and issue a decision "whenever" the Water Department has made a request.

2. Does the Rate Board have authority to set rates and charges, including below the level requested by the Water Department, if it were to find that the Department had failed to provide adequate service?

The Rate Board may set rates and charges at any level for any reason that is supported by the record in the Rate Proceeding, including below that requested by the Water Department; it is expressly charged with making a decision to "approve, modify or reject" the Department's proposed rates and charges. Code § 13-101(4)(b)(iii).

There are unquestionably issues that are only indirectly related to water rates and charges and that therefor are beyond the Rate Board's jurisdiction. *See, e.g., Borough of Moosic v. Pennsylvania Public Utilities Comm'n*, 429 A.2d 1237, 1240 (Pa. Commw. 1981) (environmental impact of the use purchaser would make of property to be purchased from utility was not within jurisdiction of the regulatory agency to consider). But the ordinance specifically requires the Rate Board to set rates and charges that are "just" and "reasonable." Code § 13-101(4)(d). It would be impossible for the Rate Board to determine that rates and charges are "reasonable" without weighing them to some extent against the service provided. If services generally provided by the Water Department are so inferior or such an abuse of its discretion that it cannot be said to be reasonable to charge what the Water Department is requesting, then the Rate Board may set lower rates on that basis.

3. What limitations, if any, are there on the rates the Rate Board may set?

The Rate Board's authority to fix and set rates and charges is limited by the standards set forth in the Charter and provided by the Code. The Charter states:

The standards pursuant to which rates and charges shall be fixed shall be such as to yield to the City at least an amount equal to operating expenses and interest and sinking fund charges on any debt incurred or about to be incurred for water supply, sewage and sewage disposal purposes.

Charter § 5-801.¹ The annotation to the section states that "This requirement does not go as far as rate standards do in the case of private utilities; for example, it is not required that the standards make allowance for depreciation." However, the fundamental principle that current expenses be covered is clear:

The Charter establishes that the Water Department is indeed required to be self-sustaining, inasmuch as it is required to meet its current operating expenses from the rates and charges it imposes. *See also* § 13-101(2) and § 13-201(2) of the Philadelphia Code. . . . While the Water Department need not recoup the "cost of service" to the same extent as a private utility, there is no question that the Charter requires recoupment of current operating expenses.

Association of Community Organizations for Reform Now v. Guarino, 512 A.2d 1312, 1316 (Pa. Commw. 1986).

The Code makes it clear that the rates and charges must support the current costs of the water system, including operating expenses, debt service, and rate covenant and sinking fund reserve requirements. Code § 13-101(4)(a). However, rates and charges are not to yield a profit or to fund any other City purpose, so they are not to yield more than current expenses, "plus a reasonable sum to cover unforeseeable or unusual expenses," in addition to the amounts needed to meet rate covenants and sinking fund reserve requirements. Code § 13-101(4)(b). The Rate Board must "recognize the importance of financial stability to customers and fully consider the Water Department's Financial Stability Plan." Code § 13-101(4)(b)(i). Within those parameters, the Rate Board must also consider "peer utility practices, best management practices and projected impacts on customer rates," *id.*; must develop rates and charges "in accordance with sound utility rate making practices and consistent with the current industry standards," Code § 13-101(4)(b)(ii); and must equitably apportion rates and charges among classes of customers in a just, reasonable and nondiscriminatory manner, Code § 13-101(4)(c)-(d).

¹ I construe the recently established charges for storm water management to fall within the definition of water and sewer services under this Section and the Code.

4. Does the Rate Board have authority to direct how the Water Department provides service?

“[An administrative agency], created by statutory law, derives its authority from legislative action. Its powers are confined to those expressly granted, or which may be necessary and proper to carry out those specifically declared.” *City of Pittsburgh v. Pennsylvania Public Utility Commission*, 43 A.2d 348, 349 (Pa. Super. 1945) (citation omitted). In that case, the court upheld the determination of the Pennsylvania Public Utility Commission’s (“PUC”) that it did not have authority to require local trains and buses to provide free service to members of the armed services. In this case, the Public Advocate has requested that the Rate Board order the Water Department to take specific actions, such as improving call center service and intake operations. The Rate Board has no authority beyond its mandate to “fix and set rates and charges” Code § 13-101(3) and to “approve, modify or reject the [Water Department’s] proposed rates and charges.” Code § 13-101(8). Accordingly, the Rate Board does not have the power to direct how the Water Department provides service.

5. May the Rate Board order a rate increase that is conditional on the Water Department’s meeting certain standards of service – as the Public Advocate has requested?

You have indicated that the Public Advocate has asked the Rate Board to provide for rate increases conditioned on the Water Department’s compliance with specific customer service improvements. I conclude that the Rate Board does not have that authority. First and foremost, there is nothing in the Rate Board’s charge to “fix and regulate rates and charges” that gives it oversight (beyond the setting of rates) of the Department’s operations. This is in stark contrast to the Pennsylvania Public Utility Commission that has express authority to issue “regulations and orders” over the utilities within its jurisdiction. *See* 66 Pa. C.S. § 1501. “[A statutory board] has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication.” *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977).

Second, that the Rate Board has not been granted authority over the Department’s operations also can be concluded from its lack of any mechanism to enforce a mandate to improve service. For example, if the Rate Board were to require that all applications to the new IWRAP program be processed within two weeks, what recourse would the Rate Board have to sanction the Department’s failure to meet that target? The only leverage available to the Rate Board would be to withhold further rate increases. However, the procedure to determine whether that target had been met and to grant or deny a rate increase on that basis would itself be a Rate Proceeding and should be conducted under the rules established for such proceedings.²

Support for the idea of a conditional rate increase might be sought in *Emporium Water Co. v. Pennsylvania Public Utility Commission*, 955 A.2d 456 (Pa. Commw. 2008), *appeal denied*, 599 Pa. 702 (2008), which upheld the PUC’s award of a conditional rate increase for part-time employees to a private utility. *Id.* at 460 n. 6 (“The PUC allowed the expense claim

² We also note that as a practical matter, a conditional rate increase might complicate the Department’s access to capital.

'on the condition that the [Utility] annually employs part-time employees with a total amount of compensation not to exceed the \$11,546 claimed on the record.' The PUC also required the Utility to 'annually report. . . to verify that it has complied with this condition.'"). However, that case is distinguishable from the Public Advocate's request in at least two respects. First, as noted above, the PUC is expressly given authority to provide general oversight to its utilities, whereas the Rate Board is not. Second, the condition upheld in *Emporium* was an expense that the utility itself had requested; the PUC order simply required the utility to do what it stated it intended to do with the revenue from the rate increase.

In short, the Rate Board has authority to "fix and regulate rates and charges," which includes the power to deny any rate increase above the baseline required by the Home Rule Charter and Code on any reasonable basis and the power to grant a rate increase for a shorter period than the Department has requested. We also believe it reasonable to infer that the Rate Board has the power to require the Department to submit any information relevant to "rates and charges" (which would include information relevant to the service provided) in the annual report required under Code § 13-101(10). However, applicable law does not give the Rate Board the authority to grant conditional rate increases.

- 6. To what extent does the Rate Board have the authority to determine the specific design of the new low-income water rate program ("IWRAP") required by Section 19-1605 of the Philadelphia Code? Is the Rate Board's authority over the IWRAP design limited to the determination of the percentage of income limitations to be imposed and the number of low-income tiers to be established?**

As the quotations in the Introduction demonstrate, not only the ordinance establishing the Rate Board, but also the relevant Charter provision, places responsibility for *all* rates and charges with the Rate Board (or with the Water Department, if no Rate Board had been established). While City Council may establish governing standards, the Rate Board is charged with actual rate making. There is a clear distinction between setting "standards" for rates and setting the actual rates and charges. As the drafters of the Charter noted in their Annotation to Charter § 5-801:

Rate-making for utility services has long been regarded as being primarily an administrative function subject to legislative standards and this section follows this practice. Council is to ordain the standards pursuant to which rates are to be fixed, a proper function of the legislative branch, and the Department is to fix rates within such standards, an appropriate function of the administrative branch.

Cases interpreting the Charter and Code confirm that distinction. *See, e.g., Monaghan v. City of Philadelphia*, 5 Pa. D.&C. 2d 329, 344-45 (Phila. 1955) ("there was reserved to council the right to set standards, from time to time, which would not directly fix the water rates, but which would determine questions of policy in connection therewith"); *see also Association of Community Organizations for Reform Now v. Guarino, supra*, 512 A.2d at 1317-18.

Council has the authority to set the "standards" under which the Rate Board is to set rates; thus Council legitimately required that IWRAP include at least three income tiers and that

the discounts result in “affordable” monthly bills. Code § 19-1605(3)(a). However, those Code provisions setting “standards” merely circumscribe ratemaking authority that already belongs to the Rate Board under the Charter. Under the Charter, consistent with the “standards” set by Council, the Rate Board has complete authority over “fixing and regulating rates and charges” – including IWRAP rates and charges. The ordinance establishing IWRAP merely gives some standards – or boundaries – to the ratemaking authority already belonging to the Rate Board. In short, the Rate Board can and must fix the method under which IWRAP rates are calculated.³

7. What authority does the Rate Board have to determine how delinquent water bills are collected or abated?

The Philadelphia Home Rule Charter provides that executive and administrative powers are “exclusively vested in and exercised by the Mayor and such other officers, departments, boards and commissions as are designated and authorized in this charter.” Charter § 1-102(1). *See also* Charter § 4-100 (Mayor “shall be responsible for the conduct of the executive and administrative work of the City”). More specifically, the Revenue Department is charged with collection of all taxes, water and sewer rents, and fees, Charter § 6-201; and the Law Department is charged with managing City litigation, including collection actions, Charter § 4-400(b). While Council may control some broad outlines of how collections are conducted, for example, setting the interest rate on delinquent accounts, it does not have the authority to micromanage how the Revenue and Law Departments perform their jobs. *See, e.g.*, Formal Opinion No. 83-15, 1983 *Opinions of the City Solicitor* at 78 (Council does not have the power to establish detailed procedures for the Mayor to follow in establishing economic development objectives); Opinion No. 06-26 (July 31, 2006) (Council does not have authority to direct content of water bills).

Under the Charter, only the Law Department has authority to settle delinquent debts, and the Rate Board’s authority for “fixing and regulating rates and charges” does not extend to directing the Revenue and Law Departments in the collection (or abatement) of those amounts. Rather, the Rate Board should set overall rates and charges, taking into account the impact on revenues of the Administration’s abatement policies.

³ Of course, the Rate Board must consider the cost of the IWRAP program when setting base rates as well.